IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

RICHARD SHARIF, et al.,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	**No. 3:05-CV-1367-B**
	§	**ECF**
WELLNESS INT'L NETWORK, LTD a/k/a WIN, et al.,	§	
	§	
	§	
	§	
Defendants.	§	

ORDER

Pursuant to the District Court's order referring motion (doc. 68), Plaintiffs' Motion to Vacate Alleged Defaulted Admissions (doc. 67) has been referred to this Court for hearing, if necessary, and determination or recommendation. "In order to allow withdrawal of a deemed admission, Rule 36(b) requires that a trial court find that withdrawal or amendment: (1) would serve the presentation of the case on its merits, but (2) would not prejudice the party that obtained the admissions in its presentation of the case." *In re Carney*, 258 F.3d 415, 419 (5th Cir. 2001) (citing *American Auto Ass'n v. AAA Legal Clinic*, 930 F.2d 1117, 1119 (5th Cir. 1991)). However, "[e]ven when these two factors are established, a district court still has discretion to deny a request for leave to withdraw or amend an admission." *In re Carney*, 258 F.3d at 419 (citation

omitted). Plaintiffs have not shown that the withdrawal would serve the presentation of this case on its merits and would not prejudice the party that obtained the admissions. Therefore, the motion to vacate is DENIED.

SO ORDERED. This 12th day of April, 2007.

_____

PAUL D. STICKNEY
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

RICHARD SHARIF, et al.,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	**No. 3:05-CV-1367-B**
	§	
WELLNESS INT'L NETWORK, LTD a/k/a WIN, et al.,	§	
	§	
	§	
	§	
Defendants.	§	

MEMORANDUM ORDER

Before the Court are Plaintiffs' objections to the Magistrate Judge's order of April 12, 2007 denying Plaintiffs' Motion to Vacate Alleged Defaulted Admissions. Having considered the objections, record evidence, and applicable law, the Court OVERRULES Plaintiffs' objections for the reasons that follow.

I. Background

On November 20, 2006, or thereabouts, Defendants served Plaintiffs with multiple sets of requests for admission, along with other discovery requests.[1] Plaintiffs' counsel, Michael Cohen, states

---

[1] Plaintiffs state that Defendants served the requests on November 20, 2006 (Objections at 1), while Defendants assert

that he received the requests on November 22, 2006 but that, at the time, he had not yet received any of Plaintiffs' documents in the case because they were in the possession of Plaintiffs' then-lead counsel of record, Robert Plotkin.[2] Accordingly, on December 20, 2006, Plaintiffs filed a motion to extend the time to respond to the discovery requests ("Motion to Extend"). The motion failed to contain either a certificate of service or a certificate of conference as required by the federal rules and the local rules of this district. See FED. R. CIV. P. 5(D); N. DIST. TEX. LOC. R. 7.1(b). On December 26, 2006, Plaintiffs separately filed a certificate of service for the motion (doc. 40).

On January 5, 2007, this Court entered an order directing the Clerk to unfile Plaintiffs' Motion to Extend on the basis that the motion did not include a certificate of conference.[3] Four days later,

---

that the requests were served on November 22, 2006. (Resp. to Objections at 2).

[2] Though Plotkin was technically designated as Plaintiffs' lead counsel of record at that time, according to Plotkin, Cohen had been acting as Plaintiffs' chief counsel and had been in charge of the prosecution of this case on Plaintiffs' behalf since Cohen entered his appearance on September 15, 2006. *See* (Unopposed Combined Verified Motion and Brief of Certain Counsel to Withdraw as Counsel for Plaintiffs at 1 (doc. 56)).

[3] Plaintiffs are under the impression that the motion was unfiled because of their failure to include a certificate of conference and a certificate of service. Not so. The Notice of Deficiency indicated that the Motion to Extend was defective because of a "Failure to include certificate of service or certificate of conference". As noted, "certificate of conference" was printed in bold face type, indicating that the Motion to

on January 9, Plaintiffs filed a "renewed" motion for an extension ("Renewed Motion to Extend") which, again, failed to include a certificate of conference. Accordingly, on January 11, 2007 the Court entered a second order directing the Clerk to strike the pleading from the docket for failure to include a certificate of conference. This time Plaintiffs made no effort to re-file the motion. By letter dated January 16, 2007, Defendants informed Plaintiffs of their position that all of the requests for admissions served on Plaintiffs had been deemed admitted under Rule 36(a). See (Pls.' Resp. to Defs.' Status Reports at Ex. 2 (doc. 66)). Over two months later, on March 22, 2007, Plaintiffs filed a Motion to Vacate Alleged Defaulted Admissions ("Motion to Vacate"). The Court referred the motion to Magistrate Judge Paul Stickney on March 23. Defendants filed their response to the motion on March 28. Plaintiffs did not file a reply brief.

On April 12, 2007, Magistrate Judge Stickney entered an order denying Plaintiffs' Motion to Vacate on the basis that Plaintiffs failed to show that the withdrawal of the admissions would serve the presentation of the case on the merits and would not prejudice the party that obtained the admissions. Plaintiffs filed their objections to the Magistrate Judge's ruling on April 22, 2007. Defendants responded to the objections on May 2, 2007.

Extend was stricken for failure to include a certificate of conference, as required by Local Rule 7.1(b).

II. Analysis

A. Legal Standard for Reviewing Objections to a Magistrate Judge's Order

Under Rule 72(a) of the Federal Rules of Civil Procedure, a district court may modify or set aside a Magistrate Judge's ruling on a nondispositive pretrial motion if the ruling is "clearly erroneous or contrary to law." FED. R. CIV. P. 72(a); 28 U.S.C. § 636(b)(1(A); *Castillo v. Frank*, 70 F.3d 382, 385 (5 Cir. 1995). A district court should overrule a Magistrate Judge's ruling only when it is "left with the definite and firm conviction that a mistake has been committed." *Concrete Pipe & Prods. of California, Inc. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 622 (1993). The Fifth Circuit has held that a party objecting to a Magistrate Judge's ruling waives legal arguments not initially raised before the Magistrate Judge. See *Cupit v. Whitley*, 28 F.3d 532, 535 (5th Cir.1994).

B. Legal Standards for Withdrawing Deemed Admissions

Under Rule 36(a) of the Federal Rules of Civil Procedure, a matter in a request for admission is deemed admitted unless the party to whom the request is directed answers or objects to the request within 30 days of service of the request. FED. R. CIV. P. 36(a). A deemed admission can only be withdrawn or amended in accordance with Rule 36(b). *See* In re *Carney*, 258 F.3d 415, 419 (5th Cir. 2001). That is, the trial court must find that the withdrawal or amendment "1) would serve the presentation of the

case on the merits, but 2) would not prejudice the party that obtained the admissions in its presentation of the case." *Id.*; FED. R. CIV. P. 36(b). Even when both factors are satisfied, a district court may still, in its discretion, deny a request to withdraw or amend an omission. *Id.* The district court's decision in that regard is reviewed under an abuse of discretion standard. *SeeLe v. The Cheesecake Factory Rests. Inc.*, 2007 WL 715260, at *2 (5th Cir. March 6, 2007).

C. Plaintiffs' Objections

Plaintiffs essentially advance three arguments in their objections as to why the Magistrate Judge's decision should be overturned. First, they argue that the presentation of the merits of their case will be subserved if the Court allows the deemed admissions to be withdrawn.[4] Second, they maintain that Defendants have failed to show that the withdrawal of the admissions will prejudice their defense. Third, Plaintiffs contend that the unfiling of their original motion for an extension of time to respond to Defendants' requests for admission was due to "excusable inadvertence" and should not serve as a basis for deeming matters admitted.

The problem is that Plaintiffs failed to raise the first two of these arguments – the ones which truly matter under Rule 36(b) and Fifth Circuit

---

[4] The Court presumes that Plaintiffs mistakenly stated in their objections that the presentation of the merits of their case would be served if the withdrawal of their admissions "is *not* permitted." (Objections at 5) (emphasis added).

authority – before the Magistrate Judge. In their Motion to Vacate Plaintiffs only advanced two reasons why their defaulted admissions should not be deemed admitted: first, because there was no court order finding them to be deemed admitted; and second, because the record showed that Plaintiffs had actually filed a certificate of service with respect to their original Motion to Extend prior to this Court's unfiling of that motion.[5] (Mot. To Vacate at 3). Though Plaintiffs recited the requirements of Rule 36(b) in their Motion to Vacate, they failed to explain or offer any argument as to how the withdrawal of the deemed admissions would serve the presentation of the case on the merits or would not prejudice Defendants. Plaintiffs' failure to address those matters were the reasons for the Magistrate Judge's denial of their Motion to Vacate. Plaintiffs now attempt to remedy their error by discussing the Rule 36(b) factors for the first time in their objections. Because Plaintiffs are not entitled to raise new theories or arguments in their objections that were not presented before the Magistrate Judge,

---

[5] Incidentally, the first of these arguments is legally incorrect, the second factually so. Plaintiffs have abandoned the former argument in their objections, presumably because they came to realize that Rule 36 is "self-executing; no court intervention is required for an admission to be established." *See Curtis v. State Farm Lloyds*, 2004 WL 1621700, at *4 (S.D. Tex. April 29, 2004). The latter argument is factually incorrect because Plaintiffs' initial Motion to Extend was not unfiled for failure to include a certificate of service, but rather because, as explained *supra* at n. 2, the motion failed to include a certificate of conference. Neither Plaintiffs' Motion to Extend nor their Renewed Motion to Extend contained a certificate of conference as required by Local Rule 7.1(b).

those arguments have been waived. *See Cupit*, 28 F.3d at 535.

Plaintiffs' objections to the Magistrate Judge's ruling fail on the merits even if they have not been waived. For starters, Plaintiffs still fail to put forth any arguments, much less any evidence, establishing that the presentation of their case on the merits will be served by allowing the withdrawal of their deemed admissions. Instead Plaintiffs simply offer conclusory statements, such as that the admissions at issue "clearly go to the core of Plaintiffs' case" and that "[t]hese central facts go to the core of Defendants' liability[.]" (Objections at 6). Plaintiffs fail to identify a single request the admission of which would hamper the presentation of their case on the merits. Nor have they so much as attached a copy of the admissions at issue to either their Motion to Vacate or their objections. Indeed, they failed to offer any evidence at all, making it difficult to meet their burden to show that the presentation of their case on the merits would be served by a withdrawal. *See Le*, 2007 WL 715260, at * 2 ("Even where the presentation of the merits of a case would be eliminated, other factors considered are whether the plaintiff has demonstrated that the merits would be served *by advancing evidence* showing 'the admission is contrary to the record of the case,' or that the admission 'is no longer true because of changed circumstances or [that] through an honest error a party has made an improvident admission.'") (quoting *N. Louisiana Rehab. Ctr. v. United States*, 179 F.Supp.2d 658, 663 (W.D. La. 2001)) (emphasis added); *Branch Banking and Trust Co. v. Deutz-Allis Corp.*, 120 F.R.D. 655, 658-59 (E.D.N.C. 1988)

denying withdrawal where there was "no affidavit, verified pleading, or other evidence at bar to suggest the admission, if left standing, would render an unjust result under the law.").

Plaintiffs instead argue that admissions on "central facts" are not permitted by Rule 36. Plaintiffs partly rely on the Fifth Circuit's statement in *Pickens v. Equitable Life Assurance Society* that "requests for admissions as to central facts in dispute are beyond the proper scope of the rule." 413 F.2d 1390, 1394 (5th Cir. 1969). *Pickens*, however, was decided prior to the 1970 amendments to Rule 36.[6] "The 1970 amendment explicitly favors the principle that *any* matter admitted under the rule is conclusively established unless the court in its discretion permits withdrawal." *Fed. Trade Comm'n v. H.N. Singer, Inc.*, 1982 WL 1907, at *2 (N.D. Cal. Oct. 26, 1982) (emphasis in original); Fed. R. Civ. P. 36 advisory committee's note ("Admissions are sought, first to facilitate proof with respect to issues that cannot be eliminated from the case, and secondly, to narrow the issues by eliminating those that can be."); 8A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2254 (2d ed. 1994) (stating that there is no basis in Rule 36 for the notion that the rule is not designed to be used to cover the entire case and every piece of evidence). Since *Pickens*, Fifth Circuit cases make clear that "Rule 36 allows litigants to request admissions as to a broad range of matters, *including ultimate facts*, as well as applications of law to fact." *Carney*, 258 F.3d at 419 (emphasis added); *Le v. The*

---

[6] Because of this, the Fifth Circuit has expressly noted that *Pickens* "cannot be relied upon in its entirety." *Le*, 2007 WL 715260, at *2 n.2.

Cheesecake Factory Rests., Inc., 2005 WL 2266610, at * 6 (S.D. Tex. Sept. 14, 2005) ("[W]hile it may be the case that the Plaintiffs' admission in this case may completely free [Defendant] of liability, Plaintiffs have nevertheless not competently pointed to existing facts in the record which contradict such admissions, they do not detail how such admissions are no longer true, or detail how the admissions were a mistake."); *see also Branch Banking and Trust Co.*, 120 F.R.D. at 658 ("Clearly, a request for admission is not improper merely because it relates to an 'ultimate fact' or to an issue of fact that is dispositive of one aspect of the case.").

Next Plaintiffs argue that Defendants have failed to demonstrate that withdrawal of the deemed admissions will prejudice their defense of this case. Plaintiffs complain that Magistrate Judge Stickney improperly placed the burden on them to show that withdrawal would not result in prejudice to Defendants. Rule 36(b) provides that the court may allow the withdrawal of admissions if the presentation of the merits will be subserved thereby "and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice that party in maintaining the action or defense on the merits." FED. R. CIV. P. 36(b). Although, in this case, the rule does place the onus on the Defendants to show that a withdrawal of the admissions will work to their prejudice, *see Coca-Cola Bottling Co. v. Coca-Cola Co.*, 123 F.R.D. 97, 102 (D. Del. 1988), Plaintiffs' representation that Defendants have never argued that they would be prejudiced by a withdrawal is simply false. (Objections at 3). In fact, Defendants' response to

Plaintiffs' Motion to Vacate devoted an entire section to the prejudice issue. There Defendants argued that a withdrawal of the deemed admissions would frustrate their efforts to secure discovery and to prepare their defense in this case given the imminence of the May 11, 2007 discovery deadline.

"Courts have usually found that the prejudice contemplated by Rule 36(b) relates to special difficulties a party may face caused by a sudden need to obtain evidence upon withdrawal or amendment of an admission." *Am. Auto Ass'n v. AAA Legal Clinic*, 930 F.2d 1117, 1120 (5th Cir. 1991). The Fifth Circuit has recognized that other courts have concluded that the type of prejudice envisioned by the rule does not include the mere fact that the proponent of the admissions may actually need to prove the matters deemed admitted or that obtaining such proof will result in additional expenses. *See Le*, 2007 WL 715260, at *3 (citing *Gutting v. Falstaff Brewing Corp.*, 710 F.2d 1309, 1314 (8th Cir. 1983); *N. Louisiana Rehab. Ctr.*, 179 F.Supp.2d at 663). But the Fifth Circuit has also acknowledged that courts have considered "within the prejudice analysis, the timing of the motion for withdrawal as it relates to the diligence of the party seeking withdrawal and the adequacy of time remaining for additional discovery before trial." *Id.* (citing *Branch Banking and Trust Co.*, 120 F.R.D. at 660 (denying withdrawal where party could have obtained information needed to respond to requests for admissions had it exercised diligence) and *N. Louisiana Rehab. Ctr.*, 179 F.Supp.2d at 663 (allowing withdrawal where adequate time remained before trial to conduct limited discovery)).

Plaintiffs here can hardly be said to have been diligent in moving for the withdrawal of the deemed admissions. True, Plaintiffs initially filed a motion to extend the deadline for responding Defendants' requests for admissions back in December 2006. That motion was unfiled, however, for failure to include a certificate of conference, an error which, one would think, is easily curable. Evidently not for Plaintiffs, as the "renewed" motion they filed in early January 2007 also failed to include a certificate of conference. Consequently, the Court unfiled it. Rather than immediately re-filing their motion to extend with, say, a certificate of conference[7], Plaintiffs, as Defendants aptly put it, simply gave up on the matter. Not until over two months later, on March 22, 2007, did Plaintiffs file a motion to vacate the deemed admissions, at a time when the May 11, 2007 discovery deadline was fast approaching. Plaintiffs fail to explain why they waited over three months after their admissions were deemed admitted to finally move to withdraw them. Without explicitly saying so, Plaintiffs suggest that the delay occurred because they first learned that Defendants' requests were deemed admitted on March 19, 2007, when Defendants filed a status report indicating as much. (Objections at 3). Any such argument fails to hold water. First, Defendants are not obligated to provide

---

[7] If Plaintiffs' counsel, who is from Illinois, was unclear as to what a certificate of conference was, he could have simply called the Court to find out or consulted with Plaintiffs' own local counsel, who, as earlier filings show, knew how to file motion papers with a certificate of conference. *See e.g.* (Plaintiffs' Unopposed Motion to Stay this Proceeding Pending the Outcome of an Appeal Currently Pending in the United States Court of Appeals for the Seventh Circuit (doc. 22)).

Plaintiffs' counsel with a tutorial on the federal rules. Second, Defendants did, in fact, advise Plaintiffs of their position with respect to the deemed admissions as early as January 16, 2007. *See* (Pls.' Resp. to Defs.' Status Report at Ex. 2 (doc. 66)). Third, Plaintiffs were obviously aware that certain consequences would follow from their failure to timely respond to Defendants' discovery requests, otherwise they would not have moved for an extension to file their responses. Plaintiffs have thus failed to demonstrate that they acted with diligence in moving for the withdrawal of their deemed admissions.

The Court also finds that the withdrawal of the admissions would have left Defendants without adequate time to conduct discovery. Plaintiffs did not file their Motion to Vacate until March 22, 2007. Defendants filed their response on March 28, 2007. Thus, the motion was not even ripe for ruling until April 12, 2007, the same day that the Magistrate Judge denied the motion. Had the Magistrate Judge allowed withdrawal at that point, less than one month would have been left for Defendants to conduct discovery in the case. Defendants clearly would have been prejudiced had they been forced to conduct discovery in such a short time frame.

Finally, the Court addresses Plaintiffs' contention that such a venial misstep as their failure to attach a certificate of conference to their motions to extend the time to respond to Defendants' discovery requests should not serve as a basis for having Defendants' requests for admissions deemed admitted. Plaintiffs miss the point. Plaintiffs had

admissions deemed against them not because of their failure to include a certificate of conference but rather because Plaintiffs never corrected their defective Motions to Extend to comply with the local rules and, more importantly, because Plaintiffs inexplicably waited until three months after their responses to Defendants' requests were due to move to withdraw the admissions. At no point did the Court inform Plaintiffs that they could *not* file a motion to extend their response deadline (in fact, had Plaintiffs properly filed such a motion it assuredly would have been granted); it simply instructed them that the motions they did file failed to conform to the local rules of this district. Reasonably prudent counsel would have promptly corrected this error by re-filing the motion with a proper certificate. Plaintiffs' counsel chose not to do so, and Plaintiffs must now bear the responsibility for that decision and for their own lack of diligence in ultimately moving to vacate their deemed admissions.

The Court will briefly address Plaintiffs' technical quibbles with the Court's unfiling of their Motions to Extend. First, Plaintiffs point out that both of their motions did inform the Court that the motions were opposed, although they concede that they failed to file a separate certificate of conference as required by Local Rule 7.1(b). (Objections at 10). The certificate of conference requirement is not a mere idle requirement intended to serve as a technical trap for unwary litigants. Rather it is designed to encourage parties to resolve disputes without requiring court intervention and to give instant notice to the court as to whether a particular motion is opposed so that it may either take action

on the motion expeditiously or await a response from the opposing side. The latter function is impeded when the results of a conference are reported within the body of the motion as opposed to in a separate certificate.

Plaintiffs point out that the Court granted their motion to extend the mediation deadline, filed the same day as their original Motion to Extend, despite the fact that such motion, like their Motion to Extend, failed to include a certificate of conference. In the motion to extend the mediation deadline, however, Plaintiffs informed the Court of Defendants' non-opposition on the first page of the motion as opposed to the second and third pages as done in the Motions to Extend. Thus, the Court could more easily ascertain whether the motion to extend the mediation deadline was opposed without having to read through the entire motion. In any event, simply because the Court granted one motion that did not technically comply with the local rules did not absolve Plaintiffs from complying with the local rules with respect to other motions.

III. Conclusion

For the foregoing reasons, the Court finds that Plaintiffs have failed to show that the Magistrate Judge's April 12, 2007 order was clearly erroneous or contrary to law. Plaintiffs' objections to the Magistrate Judge's order are accordingly OVERRULED.

SO ORDERED and. SIGNED May 7th, 2007.

JANE J. BOYLE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

RICHARD SHARIF. et al.,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	**No. 3:05-CV-1367-B**
	§	**ECF**
WELLNESS INT'L	§	
NETWORK, LTD a/k/a WIN,	§	
et al.,	§	
	§	
Defendants.	§	

MEMORANDUM ORDER

Before the Court is Defendants' Motion to Dismiss Pursuant to Fed. R. Civ. P. 9(b), 12(b)(1)[1], and 12(b)(6). For the reasons that follow, the Court GRANTS the motion in part and 1 DENIES it in part.

I. Background

This suit arises from distributorship contracts that Plaintiffs signed with Wellness International Network, Ltd. ("WIN" or "Wellness"), an entity which

---

[1] Despite the title of Defendant's motion, Defendants actually make no argument that this Court lacks subject matter jurisdiction over this case under Rule 12(b)(1), Federal Rules of Civil Procedure. Accordingly, the Court will not address Rule 12(b)(1) in this order.

purports to be a multi-level marketing operation that sells and distributes health and wellness products. (Compl. ¶ 24). Plaintiffs charge that WIN, in actuality, is nothing more than an illegal pyramid scheme. Defendant Ralph Oats is the founder of Wellness and the president of WIN Network, Inc. ("WINNI"), WIN's Managing General Partner. (Compl. ¶¶ 19-20). Oats is a regular host of seminars aimed to recruit distributors into the WIN network. (*Id.* at ¶ 20). Defendant Cathy Oats, Ralph's wife, is Secretary of WINNI and also speaks at various seminars and presentations to help sell the WIN system. (*Id.* at ¶ 21). Defendant Sherri Matthews is WIN's Director of Distributor Relations and, according to Plaintiffs, "an important official in the implementation of the Wellness scheme[.]" (*Id.* at ¶ 22).

Plaintiffs allege that they were lured into signing distributorship contracts with WIN after attending one or more seminars hosted by Ralph Oats in Chicago and/or Dallas. Plaintiffs claim that at these presentations Ralph Oats made various misrepresentations about the nature of the WIN system, among them being that WIN distributors made tens of thousands of dollars per month, that WIN was a "hands-on" company that genuinely cared about its distributors, and that WIN was not a pyramid scheme and was "perfectly legal". (*Id.* at ¶ 27). Plaintiffs also say that Oats neglected to mention at the time that each distributor would be required to pay thousands of dollars each month to "qualify" for bonuses and commissions. (*Id.*). Plaintiffs allege that they decided to sign contracts with WIN based on statements made by WIN

distributors who recruited them, statements that Ralph and Cathy Oats made at WIN presentations, and statements made in WIN literature. (*Id.* At ¶ 7). Plaintiffs Richard Sharif, Abdul and Shaheen Rashid, and Waqar and Shafqut Khan each signed WIN associate application or distributorship agreements in May 1999, December 1999, and June 2000, respectively. (*Id.* at ¶¶ 6, 71(f), 71(e)).

Plaintiffs complain that the WIN system has been operated as a classic pyramid scheme from its inception. That is, Plaintiffs allege that commissions in the system are measured, not from the actual sale of product, but rather by the number of other persons they recruit into the scheme. (*Id.* at ¶ 49). Plaintiffs claim that the pyramid structure of WIN is evidenced by their own experiences. They point out, for example, that the Rachids were hailed in WIN's quarterly newsletter for the first quarter 2000 as "Top Newcomers" for November 1999 "Based on Personal Group Retail Sales Volume in their Qualifying Month"; this despite the fact that the Rashids did not even sign their distributorship contract until December 1999, and they in fact never sold any WIN products. (*Id.* at ¶ 36). Likewise, Khan was listed in the fourth quarter 2000 edition of the newsletter as a "Top Monthly Producer" for June 2000, but he had just signed the WIN contract on June 18, 2000, and, like the Rachids, he had not actually sold any product at that time – all he had done was pay Wellness over $242,000. (*Id.* at ¶ 37). Plaintiffs also allege that WIN took legal action to stop Sharif from advertising WIN's products on the internet and was chastised by Sherri Matthews when

he sold a small amount of the product from his pharmacy. (*Id.* at ¶¶ 57-58).

Plaintiffs claim that these experiences are simply emblematic of the fact that the true objective of the WIN operation is to expand the allegedly illegal pyramid as opposed to selling health products. Sharif, the Khans, and the Rashids each claim to have lost their entire investments – amounting to $424,803.06, $266,400, and $239,000, respectively – in the WIN operation, plus additional storage costs and other expenses. (*Id.* at ¶¶ 9, 13, 17).

In April 2002 Richard and Souzan Sharif filed suit against the WIN Defendants and others in the United States District Court for the Northern District of Illinois, alleging violations of RICO. The Sharifs later filed an amended complaint adding claims for violations of federal securities law, the Illinois Consumer Fraud Act, fraud, and civil conspiracy, among other claims. In August 2002, the Rashids, the Khans, and others brought a separate suit in the Northern District of Illinois against the Wellness Defendants asserting the same claims as the Sharifs. The two actions were consolidated, and the Illinois district court ultimately dismissed the case without prejudice on December 2, 2004[2] pursuant to forum selection clauses contained in Plaintiffs' distributorship agreements mandating that jurisdiction and venue over any disputes arising out of those agreements be litigated in Dallas

---

[2] Plaintiffs filed a motion for reconsideration, which was denied on May 10, 2005. (Defs.' App. 263- 272).

County, Texas. Plaintiffs appealed the ruling to the Seventh Circuit.

While the appeal was pending, on July 8, 2005 Plaintiffs filed the instant case against the Wellness Defendants in this Court, asserting violations of the Texas Deceptive Trade Practices Act ("DTPA") and RICO and common law claims for fraud and civil conspiracy. Upon motion of the parties the Court stayed the case pending the Seventh Circuit's resolution of the Illinois appeal. On February 17, 2006 the Seventh Circuit affirmed the district court's ruling that the proper forum for the action was in Dallas County. After the parties notified this Court of the Seventh Circuit's decision, the Court lifted the stay in this case on July 27, 2006.

II. Analysis

A. Legal Standard

Motions to dismiss under Rule 12(b)(6) are disfavored and rarely granted. *Kaiser Aluminum& Chem. Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1050 (5 Cir. 1982). The Court liberally construes the complaint in the plaintiff's favor, and all pleaded facts are taken as true. *Campbell v. Wells Fargo Bank, N.A.*, 781 F.2d 440, 442 (5 Cir. 1986). Unless it appears beyond doubt that the plaintiff cannot prove any set of facts entitling it to relief, the complaint should not be dismissed. *Conley v. Gibson*, 355 U.S. 42, 45 (1957).

B. Standing of Soad Wattar, Haifa Kaj and Ragda Sharifeh

In their motion to dismiss Defendants initially challenge the standing of Wattar, Kaj, and Sharifeh (the "nominal plaintiffs") as "plaintiffs" in this case. Plaintiffs failed to address Defendants' challenge in its response brief. It is doubtful whether the nominal plaintiffs are even plaintiffs at all. The complaint alleges only that they "are all family members of Mr. Sharif and provided Mr. Sharif with the monies which were paid to the defendants in this case"(Compl. ¶ 6), and the caption of the complaint suggests that Sharif is appearing in this case as the nominal plaintiffs' agent. There are no allegations that the nominal plaintiffs entered into any contracts with WIN or that any of the WIN Defendants personally wronged them in any way. In short, the Court finds that to the extent the nominal plaintiffs are attempting to assert claims against the Defendants in their individual capacities, such claims should be dismissed for failure to state a claim.

C. Contractual Limitations

Defendants argue that Plaintiffs agreed in the WIN contracts they signed not to sue the Individual Defendants and to limit the liability of WIN and its related parties to unsold product inventory. Even if the Court assumes that the WIN agreements are valid and enforceable, those agreements do not bar extracontractual claims against the Individual Defendants. *See Budner v. Wellness Int'l Network, Ltd.*, 2007 WL 806642, at *8 (N.D. Tex. March 15, 2007). Moreover, under Texas law "a party cannot prospectively insulate itself contractually from

liability for intentional torts." *Id.* (citing *Solis v. Evans*, 951 S.W.2d 44, 50 (Tex. App. – Corpus Christi 1997, no writ)). The Court thus denies Defendants' motion to dismiss Plaintiffs' claims on contractual grounds.

D. Claims Against the Individual Defendants and WINNI

1. Sherri Matthews

Defendants claim that Plaintiffs' complaint fails to state a claim against Defendants Sherri Matthews, Cathy Oats, Ralph Oats, or WINNI. Plaintiffs merely allege that Matthews is WIN's Director of Distributor Relations and Compliance, that she was and is "an important official in the implementation of the Wellness scheme", and that she "was the official who dealt with the complaints of the plaintiffs and other distributors and was responsible for denying the refund requests of the plaintiffs." (Compl. ¶ 22). Plaintiffs fail to describe even in general terms Matthews's role in connection with their fraud, RICO, or conspiracy claims. Accordingly, the Court finds that Plaintiffs' claims against Matthews should be dismissed with prejudice.

2. Cathy Oats

The only specific allegations of wrongdoing that Plaintiffs make against Cathy Oats is that she made certain unidentified "statements" at presentations attended by Plaintiffs on which Plaintiffs allegedly relied. (Compl. ¶¶ 7, 11, 15). Rule

9(b) elevates the federal rules' liberal pleading standards to require plaintiffs to plead the circumstances constituting fraud with particularity. FED. R. CIV. P. 9(b). To satisfy 9(b)'s pleading requirements in the Fifth Circuit, plaintiffs must "specify the statements contended to be fraudulent, identify the speaker, state when and where the statements were made, and explain why the statements were fraudulent." *Southland Sec. Corp. v. Inspire Ins. Solutions*, 365 F.3d 353, 362 (5 Cir. 2004) (quoting *Williams v. WMX Technologies, Inc.*, 112 F.3d 175, 177-78 (5 Cir. 1997)); *Ins. Co. of N. Am. v. Morris*, 981 S.W.2d 667, 674 (Tex. 1998) (to prevail on a fraud claim under Texas law, plaintiff must establish, among other things, that the defendant made a material misrepresentation, which was false, and which the defendant either knew was false when made or made it recklessly without knowledge of its truth). Notably, Plaintiffs fail to allege the time, place and contents of the representations purportedly made by Cathy Oats or even allege that the representations were false in any way or that she knew they were false when made. Accordingly, Plaintiffs' claims against Cathy Oats should be dismissed for failure to plead with particularity.

3. Ralph Oats

Defendants next argue that Plaintiffs have failed to state a claim for relief against Ralph Oats, WIN's president. Plaintiffs allege that the following allegations sufficiently state a claim of fraud against Ralph Oats, each of which the Court will address in turn:

- **27. Each of the plaintiffs attended presentations hosted by defendants Ralph and Cathy Oats, including presentations given by Ralph Oats at the Multi-Level Marketing College (the "MLM College") in Dallas, Texas. At all of these presentations, Ralph Oats made similar misrepresentations. Among these misrepresentations were the following:**

  a) Wellness distributors made tens of thousands of dollars each month. In this connection, Oats would choose people out of the audience who would then stand up and tell the members of the audience that they were earning anywhere from $10,000 to $120,000 each month; (Compl. ¶ 27(a)).

First, this allegation merely states that certain unidentified speakers made statements as to the amount of money they made. It does not allege that Ralph Oats made the statements himself or that the speakers made the statements at Oats's behest. Second, Plaintiffs fail to adequately explain how such statements were fraudulent. All Plaintiffs say is that they "believe" that the speakers "did not earn anywhere near the amounts they touted to the audience, and all of these amounts, if made were made from unlawful activity in violation of Texas law." (Compl. ¶ 34). Allegations that a plaintiff merely "believes" a representation to be false must at

the very least state with particularity the facts on which such belief is formed. *See Rombach v. Chang*, 355 F.3d 164, 172 (2 Cir. 2004) (quotations and citation omitted) (to satisfy Rule 9(b) complaint must "state with particularity the specific facts in support of [plaintiffs'] belief that [defendants'] statements were false when made"). Plaintiffs have failed to do so.

- **b) Wellness was a "hands-on" company that cared about its distributors and that distributors would receive all of the guidance and assistance necessary to make the plaintiffs successful; (Compl. ¶ 27(b)).**

This allegation fails to state a claim against Oats because Plaintiffs fail to identify any allegation in their complaint stating that this alleged representation was false or how it was fraudulent.

- **c) Oats omitted any mention of the need for each distributor to pay thousands of dollars each month in order to "qualify" for bonus and commissions; (Compl. ¶ 27(c)).**

"Where an omission is alleged to be fraudulent, the pleader must plead the time and place the disclosure(s) should have been made, under what authority such a disclosure is required, and how the omission made the representation misleading." *Siemens Med. Solutions USA, Inc. v. Sunrise Med. Technology, Inc.*, 2005 WL 615747, at

*4 (N.D. Tex. March 16, 2005) (citing *United States ex rel. Riley v. St. Luke's Episcopal Hosp.*, 355 F.3d 370, 381 (5 Cir. 2004)). Under Texas law there is a "duty to disclose only where a fiduciary or confidential relationship exists." *Id.* (quoting *Bay Colony, Ltd. v. Trendmaker, Inc.*, 121 F.3d 998, 1004 (5 Cir. 1997)). Plaintiffs nowhere plead that a special relationship existed between Plaintiffs and Ralph Oats which would impose upon Oats an obligation to disclose payment requirements for WIN's distributors. Accordingly, the Court finds that Plaintiffs have failed to state a fraud claim against Oats with respect to this statement.

- **d) Wellness was not a pyramid scheme and was perfectly legal.**

Defendants contend that this statement is not actionable because it is merely a statement of opinion about a legal matter, which is not actionable under Texas law. However, one of the cases Defendants cite, *Fina Supply, Inc. v. Abilene Nat'l Bank*, 726 S.W.2d 537, 540 (Tex. 1987), states that

> There are certain exceptions to the general rule that misrepresentations involving a point of law or the legal effect of a document will not support an action for fraud. These exceptions embody a recognition that in certain circumstances a statement of opinion can rise to the level of fraud. A party having superior knowledge, who takes advantage of another's ignorance of the law to deceive him by studied concealment or misrepresentation, can be held responsible for this conduct. Relief may also be

> granted for misrepresentation as to a point of law or of legal rights where there is a fiduciary or confidential relationship of trust between the parties. Additionally, misrepresentations involving a point of law will be considered misrepresentations of fact if they were intended and understood as such.

Id. at 540. In this case it is possible that Plaintiffs can show that Oats had superior knowledge regarding the legality of WIN's operations and intended to take advantage of Plaintiffs' ignorance in legal matters. It is also conceivable that Oats's alleged statement may be considered a misrepresentation of fact if he intended it to be, and it was, understood as such. Accordingly, because it does not appear beyond doubt that Plaintiffs cannot prove any set of facts entitling them to relief with respect to this statement, the Court finds that the complaint should not be dismissed as to Oats in its entirety.

4. WINNI

Defendants claim that Plaintiffs' complaint fails to explain why WINNI is a defendant in this action. Plaintiffs allege that WINNI is the Managing General Partner of WIN, a limited partnership. (Compl. ¶ 19). Under Texas law general partners are jointly and severally liable with the limited partnership for the obligations of the partnership. *See* TEX. REV. CIV. STAT. ANN. art. 6132a-1 § 4.03; *Shaw v. Kennedy, Ltd.*, 879 S.W.2d 240, 247 (Tex. App. – Amarillo 1994, no pet.). WINNI is thus a proper party in this case.

E. Plaintiffs' Standing as "Consumers" Under the DTPA

To maintain a cause of action under the DTPA, Plaintiffs must establish that: (1) they are consumers under the DTPA with respect to their claim against Defendants; (2) Defendants committed a false, misleading, or deceptive act under § 17.46(b) of the DTPA, breached an express or implied warranty, or engaged in an unconscionable action or course of action; and (3) these acts were the producing cause of their damages. *See Brittan Communications v. Southwestern Bell Tel. Co.*, 313 F.3d 899, 907 (5 Cir. 2002). Defendants contend that Plaintiffs cannot meet the first element because they "do not allege any problem or defect with any goods purchased from Wellness." (Defs.' Mot. 17). A "consumer" is defined under the DTPA as "an individual, partnership, [or] corporation . . . who seeks or acquires by purchase or lease, any goods or services[.]" TEX. BUS. & COM. CODE § 17.45(4). To have standing to sue under the DTPA Plaintiffs must (1) have sought or acquired goods or services by purchase or lease; and (2) the goods or services purchased or leased must form the basis of the complaint." *Brittan*, 313 F.3d at 907. The DTPA defines "goods" as "tangible chattels or real property purchased or leased for use." TEX. BUS. & COM. CODE § 17.45(1). The defendant's deceptive conduct must have occurred "in connection with" a consumer transaction for liability to attach under the DTPA. *See Amstadt v. U.S. Brass Corp.*, 919 S.W.2d 644, 649 (Tex. 1996).

Plaintiffs allege in their complaint that they were required to make significant ongoing purchases of Wellness products in order to earn the types of returns promised by Defendants. The purchased inventory would then be sold downline to new recruits. *See e.g.* (Compl. ¶ 8) ("distributors were required to purchase thousands of dollars of additional products from Wellness each month – regardless of whether they had sold any of the products in their possession."); (Compl. ¶ 60) ("[T]he only way for a distributor to dispose of his or her products is to recruit new distributors by stressing the opportunity."). Plaintiffs have thus sufficiently alleged that they "acquired goods" – the WIN products – "by purchase", thus meeting the first standing requirement. Plaintiffs also meet the second because, although they do not necessarily allege that the products were defective,[3] they do sufficiently allege that Defendants duped them into buying them in the first place by leading them to believe that the end result was to sell them to consumers as opposed to being passed on to downline recruits. The Court thus finds that Plaintiffs have standing to sue under the DTPA because they allege deceptive conduct on the part of Defendants "in connection with" a consumer transaction. *Cf. Millar v. Sexton*, 2002 WL 1981391 (Tex. App. – Dallas Aug. 29, 2002, no pet.) (affirming trial court's judgment that organizers violated § 17.46(21) by setting up pyramid scheme).

---

[3] Plaintiffs do complain, however, that WIN routinely shipped products to distributors that had 3 expired "use by dates" on them and denied requests by distributors to send fresh products. (Compl. ¶ 59).

Section 17.461 of the DTPA makes it a state jail felony offense if a person "contrives, prepares, establishes, operates, advertises, sells, or promotes a pyramid promotional scheme." TEX. BUS. & COM. CODE § 17.461(c). Defendants are correct in saying that § 17.461 does not create a private right of action. However, § 17.50(a)(1)(A) provides that a consumer may maintain an action when a person engages in a false, misleading, or deceptive act or practice that is listed in § 17.46(b). Section 17.46's "laundry list" of "false, misleading, or deceptive acts or practices" includes "promoting a pyramid promotional scheme, as defined by Section 17.461." TEX. BUS. & COM. CODE § 17.46(b)(21). Plaintiffs may thus bring a private right of action under sections 17.46 and 17.50 based on allegations that Defendants promoted an unlawful pyramid scheme.

F. Failure to State a DTPA Claim

Defendants also contend that Plaintiffs have included no factual allegations in their complaint that WIN is an unlawful pyramid scheme. The DTPA defines a "pyramid promotional scheme" as a "plan or operation by which a person gives consideration for the opportunity to receive compensation that is derived primarily from a person's introduction of other persons to participate in the plan or operation rather than from the sale of a product by a person introduced into the plan or operation." TEX. BUS. & COM. CODE § 17.461(a)(6). Plaintiffs' complaint clearly alleges such a scheme. Plaintiffs specifically allege, for example, that when describing WIN in a video presentation, Ralph Oats made statements such as: "We are not about selling"; "Now every time

you bring a person into the business, you have to understand, that six people are going to earn on what that person did"; and that "I am telling you that all of you who are [holding product information meetings] are guilty as sin of getting yourself set up in a product business . . . but you are not recruiting anybody and I will tell you why you are not recruiting anybody[.]" (Compl. ¶¶ 51-53). Plaintiffs also allege that "[t]he real objective of the defendants' scheme is pyramiding and not the sale or distribution of their products, which is also shown by the fact that Wellness solicits and accepts as distributors persons who have no basis or structure for retailing Wellness products." (Compl. ¶ 55). Plaintiffs have sufficiently stated a DTPA violation.

G. RICO Claims

Plaintiffs claim that Defendants violated subsections (a)-(d) of 18 U.S.C. § 1962 of the RICO statute. A Plaintiff properly asserts a RICO claim where it is shown that (1) a person engages in (2) a pattern of racketeering activity that is (3) connected to the acquisition, establishment, conduct, or control of an enterprise. *St. Paul Mercury Ins. Co. v. Williamson*, 224 F.3d 425, 439 (5th Cir. 2000). A "person" under RICO is the defendant that committed the RICO violations and can be "any individual or entity capable of holding a legal or beneficial interest in property." 18 U.S.C. § 1961(3); *St. Paul*, 224 F.3d at 440. "Racketeering activity" includes certain state and federal offenses listed in § 1961(1). *Kwan-Tai Corp. v. Mastercraft Printers, Inc.*, 2001 WL 487329, at *4 (E.D. La. May 7, 2001). The individual acts of racketeering are commonly

described as the "predicate" acts or offenses. *Id.* Predicate acts include instances of mail and wire fraud. *Tel-Phonic Serv., Inc. v. TBS Int'l, Inc.*, 975 F.2d 1134, 1138 (5 Cir. 1992). An "enterprise" is broadly defined by the act, and it "can be either a legal entity or an association-in-fact." 18 U.S.C. § 1961(4); *St. Paul*, 224 F.3d at 440.

1. Plaintiffs Have Not Pleaded Predicate Acts With Particularity

Plaintiffs allege that Defendants' alleged pattern of unlawful racketeering activity consisted of multiple predicate acts of mail and wire fraud, in violation of 18 U.S.C. §§ 1341 & 1343. (Compl. ¶ 93). Because these predicate acts are founded on allegations of fraud, Plaintiffs must satisfy the heightened pleading standards of Rule 9(b). *See Tel-Phonic*, 975 F.2d at 1138; *Walsh*, 195 F.Supp.2d at 846. Rule 9(b) requires Plaintiffs to plead the "circumstances constituting fraud with particularity." FED. R. CIV. P. 9(b). "At a minimum, Rule 9(b) requires allegations of the particulars of 'time, place, and contents of the false representations, as well as the identity of the person making the misrepresentations and what he obtained thereby.'" *Tel-Phonic*, 975F.2d at 1139 (quoting 5C CHARLES ALAN WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE AND PROCEDURE, at § 1297 (1990)).

"In the civil RICO context, Rule 9(b) also requires the plaintiff to allege specifically how *each* act of mail or wire fraud furthered the fraudulent scheme, who caused what to be mailed or wired

when, and how the mailing or wiring furthered the fraudulent scheme." *FMC Int'l A.G. v. ABB Lummus Global, Inc.*, 2006 WL 213948, at *4 (S.D. Tex. Jan. 25, 2006) (emphasis in original) (citing *Heden v. Hill*, 937 F.Supp. 1230, 1243 (S.D. Tex. 1996)). Moreover, Plaintiffs' allegations must "inform each defendant of the nature of his alleged participation in the fraud." *DiVittorio v. Equidyne Extractive Indus., Inc.*, 822 F.2d 1242, 1247 (2 Cir. 1987). In other words, Plaintiffs cannot simply "attribute vaguely the alleged fraudulent activity to the 'defendants' collectively." *FMC Int'l*, 2006 WL 213948, at *4 (citing *Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1175 (2 Cir. 1993)). Finally, Plaintiffs must plead reliance on the predicate acts in order to show proximate cause under RICO. *See Summit Props. Inc. v. Hoechst Celanese Corp.*, 214 F.3d 556, 558-59 (5 Cir. 2000); *see also Old Time Enters., Inc. v. Int'l Colony Corp.*, 862 F.2d 1213, 1218 (5 Cir. 1989) ("[A] proximate causal relation must exist between the RICO predicate acts and the plaintiff's damages.").

Defendants claim that Plaintiffs fail to allege specific violations of the mail or wire fraud statutes by any defendant and that Plaintiffs also fail to allege who made the purported representations, when and where they were made, the contents of the representations or what the Defendants obtained by the representations. Defendants also complain that Plaintiffs merely allege that "Defendants" generally committed the predicate acts without identifying which defendant committed each act. The Court finds that, with respect to each of the predicate acts identified, Plaintiffs have failed to specifically allege 1) which Defendant committed the described acts; 2)

what that particular Defendant obtained thereby; 3) how each predicate act furthered the fraudulent scheme; and 4) how Plaintiffs relied on each predicate act to their detriment.

Just by way of example, in paragraph 71 (e) of the complaint, Plaintiffs allege that Defendants caused newsletters to be mailed in January, April, July, and October of each year since 1998 and that many if not all of these newsletters "contain deceptive and fraudulent information and promotional statements" without detailing the time, place, and content of the allegedly fraudulent statements or which particular defendant was responsible for making them. Plaintiffs also list various purported examples of misleading statements contained in the WIN newsletters (*see* Compl. ¶¶ 71(e)-(h)), yet they fail to specify how their reliance on any of the predicate acts set forth caused their injuries. For instance, Plaintiffs state that the WIN newsletter for fourth quarter 2000 deceptively portrayed Khan as a "Monthly Top Producer" for June 2000 despite the fact that he only became a WIN distributor in the same month and never earned any profit in June 2000. (Compl. § 71(e)). While this communication might well be misleading or deceptive, Plaintiffs have failed to plead how Khan or any other Plaintiff relied on the communication to their detriment; it appears, for example, that Khan at least had already made a substantial investment in WIN by the time the statement was ever published. (*Id.*).

Citing to *Corley v. Rosewood Care Center, Inc.*, 142 F.3d 1041, 1051 (7 Cir. 1998), Plaintiffs suggest

that Rule 9(b)'s requirements "can be relaxed in cases such as the one at bar." (Pls.' Resp. at 18). But *Corley* simply recognized that the particularity requirement of Rule 9(b) can be eased in certain situations where the plaintiff lacks access to all facts necessary to set forth his claim. *Corley*, 142 F.3d at 1051. The complaint at issue in *Corley* specifically emphasized that specific information, such as the time or place a communication was made, and the identity of those to whom the communications were directed, was peculiarly within the knowledge of the defendants. *Id.* Plaintiffs make no such allegation here, either in their complaint or in their briefing.

2. *Plaintiffs Have Failed to State a Claim Under RICO*

a. 18 U.S.C. § 1962(a)

The Fifth Circuit has held that § 1962(a) must be read in conjunction with RICO's civil remedies provision – § 1964(c) – which creates a civil right of action for "[a]ny person injured in his business or property by reason of a violation of section 1962[.]" *Nolen v. Nucentrix Broadband Networks Inc.*, 293 F.3d 926, 929 (5 Cir. 2002). The plaintiff's injury must directly arise from the violation of the RICO section at issue. *Id.* With respect to § 1962(a), a plaintiff must allege "that its injury flows from the use or investment of racketeering proceeds, rather than from the underlying predicate racketeering acts." In re *Sunpoint Sec., Inc.*, 350 B.R. 741, 747 (Bankr. E.D. Tex. 2006). Here, Plaintiffs merely allege in conclusory fashion that each of the Defendants used or invested "income derived from the pattern of unlawful activity to operate, maintain control of and maintain an interest in the unlawful enterprises" and that "[a]s a direct and proximate result of said unlawful conduct", Plaintiffs were defrauded of over $215,800. (Compl. ¶¶ 94, 97). In essence, Plaintiffs merely recite the elements of the statute and claim that they suffered damages as a result. Such conclusory allegations are insufficient to state a § 1962(a) claim. *See Abraham v. Singh*, – F.3d –, 2007 WL 575833, at *4 (5 Cir. Feb. 26, 2007).

b. 18 U.S.C. § 1962(b)

To recover under § 1962(b), "a plaintiff must show that his injuries were proximately caused by a RICO person gaining an interest in, or control of, the enterprise through a pattern of racketeering activity." *Crowe v. Henry*, 43 F.3d 198, 205 (5 Cir. 1995). Plaintiffs have again stated their claim in a conclusory way, merely alleging that "[t]hrough the pattern of racketeering activity alleged herein, the defendants have acquired and/or maintained, directly or indirectly, an interest and/or control of the unlawful enterprises[.]" (Compl. ¶ 99). The complaint sets forth no facts showing any sort of causal connection between their injuries and a Defendant's acquisition and/or maintenance and/or interest in the described enterprises. Lacking such facts, Plaintiffs' § 1962(b) claim must be dismissed. *See Abraham*, 2007 WL 575833, at *5.

c. 18 U.S.C. § 1962(c)

Section 1962(c) makes it "unlawful for any person employed by or associated with any enterprise . . . to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity[.]" Plaintiffs assert that each of the Defendants are RICO "persons", and they assert two enterprises: (1) WIN itself; and (2) an association-in-fact enterprise consisting of all Defendants. (Compl. ¶¶ 91-91). Under § 1962(c), the RICO "person" and the RICO "enterprise" must be distinct. *See Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 161 (2001); *St. Paul*, 224 F.3d at 445. This required distinction is based on a textual reading of § 1962(c), which speaks of "person[s] who are 'employed by or associated with'

the 'enterprise.'" *Cedric Kushner*, 533 U.S. at 161. One can only employ, be employed by, or associate with others, "not oneself." *Id.*; *Bishop v. Corbitt Marine Ways, Inc.*, 802 F.2d 122, 122 (5 Cir. 1986). WIN thus cannot be a valid enterprise because WIN is also named as a RICO person.

A RICO person's membership in an association-in-fact enterprise does not violate the person/enterprise distinction. *See St. Paul*, 224 F.3d at 447. However, "[t]he fact that officers or employees of a corporation, in the course of their employment, associate to commit predicate acts does not establish an association-in-fact enterprise distinct from the corporation." *Elliot v. Foufas*, 867 F.2d 877, 881 (5 Cir. 1989); *Whelan v. Winchester Prod. Co.*, 319 F.3d 225, 229 (5 Cir. 2003) ("It is not enough to establish that a defendant corporation through its agents committed the predicate acts in the conduct of its own business."); *Atkinson v. Anadarko Bank & Trust Co.*, 808 F.2d 438, 441 (5 Cir. 1987) (concluding that bank, holding company, and three bank employees did not exist separately apart from the bank); *Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A.*, 30 F.3d 339, 344 (2 Cir. 1994) ("[B]y alleging a RICO enterprise that consists merely of a corporate defendant associated with its own employees or agents carrying on the regular affairs of the defendant, the distinctness requirement may not be circumvented."). Although each these cases involved corporations, the Court perceives of no reason why the same principle should not apply to partnerships. *See Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union Local Union* 639, 883 F.2d 132, 141 (D.C. Cir. 1989), *modified on other*

grounds, 913 F.2d 948 (D.C. Cir. 1990) ("[W]hile the corporate or *organizational* defendant may itself be a member of the enterprise association, the member[s] of the enterprise association may not simply be subdivisions, agents, or members of the defendant organization.") (emphasis added). Here Plaintiffs simply allege that the association enterprise consists of WIN itself, its general partner (WINNI), WINNI's officers (Ralphand Cathy Oats), and a WIN employee (Matthews). (Compl ¶ 92). Because the purported members of the association enterprise are all constituent members of WIN, Plaintiffs have failed to plead the existence of an association-in-fact enterprise apart from WIN.

d. 18 U.S.C. § 1962(d)

In light of Plaintiffs' failure to state a claim for relief under § 1962(a)-(c), their § 1962(d) conspiracy claim must necessarily fail. *See Ashe v. Corley*, 992 F.2d 540, 544 (5 Cir. 1993); *Webster v. NY Life Ins. Co.*, 1998 WL 28261, at *6 (E.D. La. Jan. 16, 1998) ("Any claim under § 1962(d) based on conspiracy to violate the other subsections of section 1962 necessarily must fail if the substantive claims are themselves deficient.").

H. Limitations

Finally, Defendants argue that the operation of applicable statutes of limitation bar all of Plaintiffs' claims. The limitations periods that apply to Plaintiffs' claims range from two to four years. *See* TEX. BUS. & COM. CODE § 17.565 (DTPA – 2 years); *Connell v. Connell*, 889 S.W.2d 534, 541 (Tex.

App. – San Antonio 1994, writ denied) (civil conspiracy – 2 years); TEX. CIV. PRAC. & REM. CODE § 16.004(a)(4) (fraud – 4 years); *Rotella v. Wood*, 528 U.S. 549, 553 (2000) (civil RICO – 4 years). Defendants assert that Plaintiffs' allegations with respect to all of their claims center around conduct occurring, at latest, in January 2001. Because Plaintiffs did not file this suit until July 8, 2005, Defendants contend that all of Plaintiffs' claims are time-barred. Plaintiffs argue that their claims are rescued by the Texas Savings Clause ("Savings Clause"), which provides as follows:

> (a) The period between the date of filing an action in a trial court and the date of a second filing of the same action in a different court suspends the running of the applicable statute of limitations for the period if:
>
> > (1) because of lack of jurisdiction in the trial court where the action was first filed, the action is dismissed or the judgment is set aside or annulled in a direct proceeding; and
> >
> > (2) not later than the 60 day after the date the dismissal or other disposition becomes final, the action is commenced in a court of proper jurisdiction.
>
> (b) This section does not apply if the adverse party has shown in abatement that the first filing was made with intentional disregard of proper jurisdiction.

TEX. CIV. PRAC. & REM. CODE § 16.064.

Plaintiffs claim that the Savings Clause applies because this suit was filed within 60 days after the Illinois court dismissed their earlier consolidated case based on a provision in their distributorship contracts making jurisdiction and venue mandatory in Dallas County. Defendants counter that the Savings Clause does not apply for four reasons. First, they claim that the clause does not apply to Plaintiffs' claims based on the Texas DTPA because Plaintiffs never asserted Texas claims in the Illinois court. Plaintiffs did, however, assert claims under the Illinois Consumer Fraud Act ("ICFA") in Illinois. The question is whether, under the Savings Clause, Plaintiffs' filing of the ICFA claims in the Illinois action stands as a proxy for their DTPA claims brought in Texas. The Court believes that the parties' briefing inadequately addresses the issue, so it will not decide the issue at this time. Defendants may raise their limitations arguments again on summary judgment.

Second, Defendants maintain that the Savings Clause cannot save Plaintiffs' RICO claim from the limitations bar because a state savings clause cannot be used to extend a federal limitations period. Because the Court has found that Plaintiffs' RICO claims should be dismissed it need not address Defendants' limitation argument with respect to those claims.

Third, Defendants contend that "an action in one state does not toll the running of the statute of limitations against action in another state." The

Fifth Circuit rejected the same argument when it was advanced by the defendant in *Long Island Trust Co. v. Dicker*, 659 F.2d 641, 647 (5 Cir. 1981) ("[W]e believe that the Texas courts would apply [the Savings Clause] to a suit which . . . was dismissed for want of jurisdiction in the court of a sister state and has been refiled within sixty days thereafter in a court of proper jurisdiction."). It is true, as Defendants point out, that the *Long Island Trust* Court applied § 16.064's predecessor statute – article 5539a of the Texas Revised Civil Statutes; yet Defendants fail to explain how the two statutes are in any way substantively different from each other such to make the holding of *Long Island Trust* inapplicable to § 16.064. Both statutes toll the running of the applicable statute of limitations between the date of the filing a first and second action if the first action was dismissed because of lack of jurisdiction in the "trial court" and the second action is commenced in a court of proper jurisdiction within 60 days of the dismissal. The Fifth Circuit explained that under its terms the "statute does not refer to dismissal from 'a Trial Court of this jurisdiction'; it simply says 'Trial Court.'" *Id.* at 646.

Finally, Defendants contend that § 16.064 does not apply because Plaintiffs filed their suit in Illinois "with intentional disregard of proper jurisdiction." Defendants claim that Plaintiffs were "clearly aware of the terms of their agreements with Wellness, which unequivocally required lawsuits to be filed in Dallas, Texas." (Defs.' Mot. at 25). It can certainly be said that the associate and distributorship agreements Plaintiffs signed contained language unequivocally fixing venue and jurisdiction in Dallas

County. However, those agreements expressly incorporated the WIN Rules and Regulations, which required each distributor to unconditionally submit themselves to the "nonexclusive jurisdiction" of a Dallas court. It is not entirely implausible that Plaintiffs, in filing suit in Illinois, had a good faith, but ultimately mistaken, belief that doing so was proper because the WIN rules said that jurisdiction in Texas was "nonexclusive". The Court makes no judgment at this stage as to whether Plaintiffs had such a good faith belief; however, the Court cannot say as a matter of law that Plaintiffs can prove no set of facts showing that they did.

III. Conclusion

For the reasons set forth above, the Court GRANTS Defendants' motion to dismiss in part and DENIES it in part. The Court DISMISSES with prejudice Plaintiffs' claims against Defendant Sherri Matthews for failure to state a claim. The Court DISMISSES without prejudice Plaintiffs' claims against Defendant Cathy Oats for failure to meet the heightened pleading requirements of Rule 9(b). The Court DISMISSES without prejudice Plaintiffs' claims against Defendant Ralph Oats, except as otherwise noted in this order, for failure to meet the heightened pleading requirements of Rule 9(b). The Court DISMISSES without prejudice Plaintiffs' RICO claims in their entirety for failure to meet the heightened pleading requirements of Rule 9(b) and for failure to state a claim. In all other respects, Defendants' motion to dismiss is DENIED. The Court will allow Plaintiffs 15 days from the date of this order to, consistent with Rule 11 of the federal

rules, file an amended complaint if they so choose in compliance with the particularity requirements of Rule 9(b) and Fifth Circuit case law and the requirements necessary to state a valid RICO claim. Plaintiffs will **not** be permitted to add any new substantive claims, and no extensions of the re-pleading deadline will be granted. Should Plaintiffs elect not to file an amended complaint, the foregoing claims dismissed without prejudice will be dismissed with prejudice.[4]

SO ORDERED.

SIGNED May 9th, 2007

JANE J. BOYLE
UNITED STATES DISTRICT JUDGE

---

[4] Nothing in this order affects this Court's May 7, 2007 order overruling Plaintiffs' objections to the Magistrate Judge's order of April 12, 2007 or the Court's May 8, 2007 order denying Plaintiffs' motion for a continuance.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

RICHARD SHARIF, et al.,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	**No. 3:05-CV-1367-B**
	§	**ECF**
WELLNESS INT'L	§	
NETWORK, LTD a/k/a WIN,	§	
et al.,	§	
	§	
Defendants.	§	

MEMORANDUM ORDER

Before the Court are: 1) Defendants' Partial Motion to Dismiss Plaintiffs' First Amended Complaint (doc. 83); and 2) Defendants' Motion for Summary Judgment (doc. 85). For the reasons that follow, the Court GRANTS Defendants' motion for summary judgment in its entirety. The Court therefore need not address the issues presented by Defendants' motion to dismiss.

I. Background

This suit arises from distributorship contracts that Plaintiffs signed with Wellness International Network, Ltd. ("WIN" or "Wellness"), an entity which purports to be a multi-level marketing operation that sells and distributes health and wellness products. (Pls. First Am. Compl. ¶ 12). According to Plaintiffs,

WIN's founder, Ralph Oats, and his wife Cathy hosted seminars around the country promising riches to those who would become distributors of Wellness products. (*Id.* at ¶¶13-31). Plaintiffs claim that Ralph Oats told them that the more money they invested in the Wellness system, the more they stood to gain. (*Id.* at ¶ 15). Enticed by the promises made by the Oatses and other statements made in various pieces of WIN literature, each of the Plaintiffs signed distributorship contracts with WIN and invested substantial sums of money in inventory purchases.

Plaintiffs complain that only after they made their investments did they learn that WIN is really nothing more than a classic, and illegal, pyramid scheme. They claim that under the WIN system compensation is primarily based on a distributor's introduction of new recruits into the scheme as opposed to the actual sale of health products marketed by the company. (*Id.* at ¶ 42). Plaintiffs allege that they lost their entire investments – totaling over $995,000. (*Id.* at ¶ 62).

In April 2002 Plaintiff Richard Sharif and his wife filed suit against the WIN Defendants and others in the United States District Court for the Northern District of Illinois, alleging violations of Racketeer Influenced and Corrupt Organizations Act ("RICO"). They later filed an amended complaint adding claims for violations of federal securities laws, the Illinois Consumer Fraud Act, fraud, and civil conspiracy, among others. In August 2002, Plaintiffs Waqar and Shafqut Khan (the "Khans") and Plaintiffs Abdul and Shaheen Rashid (the "Rashids") brought a separate suit against the WIN

Defendants in the Northern District of Illinois asserting the same claims as the Sharifs. The two actions were consolidated, and the Illinois district court ultimately dismissed the case without prejudice on December 2, 2004 pursuant to forum selection clauses contained in the distributorship agreements Plaintiffs signed mandating that jurisdiction and venue over any disputes arising out of the agreements be litigated in Dallas County, Texas. Plaintiffs appealed the ruling to the Seventh Circuit.

While the appeal was pending, on July 8, 2005, Plaintiffs filed the instant case against the Wellness Defendants in this Court, asserting violations of the Texas Deceptive Trade Practices Act ("DTPA") and RICO and common law claims for fraud and civil conspiracy. Upon motion of the parties the Court stayed the case pending the Seventh Circuit's resolution of the Illinois appeal. On February 17, 2006, the Seventh Circuit affirmed the district court's ruling that the proper forum for the action was in Dallas County. After the parties notified this Court of the Seventh Circuit's decision, the Court lifted the stay in this case on July 27, 2006.

On August 9, 2005, Defendants filed a motion to dismiss Plaintiffs' claims against them under Rules 9(b) and 12(b)(6) of the Federal Rules of Civil Procedure. On May 9, 2007, the Court granted the motion in part and denied it in part. In short, the Court: dismissed Plaintiffs' claims against Defendant Sherri Matthews with prejudice for failure to state a claim; dismissed most of the claims against Ralph Oats without prejudice for failure to meet the

heightened pleading requirements of Rule 9(b); and dismissed all of Plaintiffs' RICO claims without prejudice for failure to comply with Rule 9(b) and for failure to state a claim. The Court allowed Plaintiffs 15 days to file an amended complaint curing the deficiencies identified in the Court's memorandum order.

Before proceeding further, a few words must be said about Plaintiffs' startling want of zeal in prosecuting this action. Defendants claim (and Plaintiffs have never refuted) that Plaintiffs have never: served initial disclosures, propounded any written discovery, requested any depositions, or designated any experts. Nor have Plaintiffs been responsive to Defendants' discovery requests. On November 20, 2006, Defendants served each of the Plaintiffs with requests for admissions along with a number of other types of requests. The requests went unanswered. Defendants thus took the position that all of the requests for admissions they had propounded had been deemed admitted under Rule 36(a). On March 22, 2007, Plaintiffs moved to vacate the deemed admissions. The Court referred the motion to Magistrate Judge Paul Stickney, and on April 12, 2007, Magistrate Judge Stickney entered an order denying the motion to vacate on the ground that Plaintiffs failed to show that the withdrawal of the admissions would serve the presentation of the case on the merits and would not prejudice the Defendants. Plaintiffs filed objections to the Magistrate Judge's ruling, which this Court overruled in a May 7, 2007 memorandum order. The requests for admissions served upon Plaintiffs on

November 20, 2006 have thus been conclusively deemed admitted.

On May 24, 2007, Plaintiffs filed their First Amended Complaint in which two causes of action are asserted: 1) DTPA violations and 2) violations of RICO under 18 U.S.C. § 1962(a)-(c). On June 5, 2007, Defendants filed a partial motion to dismiss Plaintiffs' RICO claims. On June 11, 2007, Defendants filed a motion seeking summary judgment on all of Plaintiffs' extant claims in this case. Plaintiffs have filed responses to both motions.

As the issues raised by Defendants' motion for summary judgment prove dispositive of all claims, the Court focuses its attention on that motion. Defendants claim entitlement to summary judgment on the following grounds: 1) Plaintiffs' deemed admissions negate one or more material elements of each of their claims; 2) the applicable statutes of limitations bar all of Plaintiffs' claims; 3) Plaintiffs can put forward no evidence in support of their claims; and 4) Plaintiffs' failure to serve initial disclosures bars them from offering any evidence or witnesses at trial. In this order the Court will address the first and third grounds.

II. Analysis

A. Summary Judgment Legal Standard

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is appropriate when the pleadings and record evidence show that no genuine issue of material fact exists and that the

movant is entitled to judgment as a matter of law. *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5 Cir. 1994). "[T]he substantive law will identify which facts are material." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Only disputes about material facts will preclude the granting of summary judgment. *Id.*

The burden is on the summary judgment movant to prove that no genuine issue of material fact exists. *Latimer v. Smithkline & French Lab.*, 919 F.2d 301, 303 (5 Cir. 1990). If the non-movant bears the burden of proof at trial, the summary judgment movant need not support its motion with evidence negating the non-movant's case. Rather, the movant may satisfy its burden by pointing to the absence of evidence to support the non-movant's case. *Id.*; *Little*, 37 F.3d at 1075.

Once the movant has met its burden, the non-movant must show that summary judgment is not appropriate. *Little*, 37 F.3d at 1075 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)). "This burden is not satisfied with 'some metaphysical doubt as to material facts,' . . . by 'conclusory allegations,' . . . by 'unsubstantiated assertions,' or by only a 'scintilla' of evidence." *Id.* (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)). The non-moving party must "come forward with 'specific facts showing that there is a *genuine issue for trial.*'" *Matsushita*, 475 U.S. at 587 (emphasis in original) (quoting FED. R. CIV. P. 56(e)). To determine whether a genuine issue exists for trial, the court must view all of the evidence in the light most favorable to the nonmovant, and the

evidence must be sufficient such that a reasonable jury could return a verdict for the non-movant. *Munoz v. Orr*, 200 F.3d 291, 302 (5 Cir. 2000); *Anderson*, 477 U.S. at 248.

B. Deemed Admissions

Defendants first move for summary judgment on the basis that Plaintiffs' deemed admissions negate all of their liability allegations. "Rule 36 allows litigants to request admissions as to a broad range of matters, including ultimate facts, as well as applications of law to fact." In re *Carney*, 258 F.3d 415, 419 (5 Cir. 2001). Any matter deemed admitted under the rule is conclusively established unless the court allows the admissions to be withdrawn. FED. R. CIV. P. 36(b). Rule 56(c) expressly provides that admissions on file may serve as a basis for summary judgment. FED. R. CIV. P. 56(c). A party's failure to respond to requests for admissions dealing with essential issues leaves that party peculiarly vulnerable to summary judgment. *See Hill v. Breazeale*, 197 Fed. Appx. 331, 336, 2006 WL 2528346 (5 Cir. Sept. 1, 2006) (citing *Dukes v. S. Carolina Ins. Co.*, 770 F.2d 545, 548-49 (5 Cir. 1985)). While the Fifth Circuit has recognized the "potential harshness" involved when defaulted admissions are case-dispositive, it has at the same time emphasized that compliance with procedural rules is "necessary to insure the orderly disposition of cases." *Carney*, 258 F.3d at 421 (quoting *United States v. Kasuboski*, 834 F.2d 1345 (7 Cir. 1987)).

In their response to Defendants' summary judgment motion Plaintiffs admit that "it is impossible for the Plaintiffs to overcome Defendants' motion for summary judgment based upon the defaulted admissions being deemed admitted." (Pls. Resp. 3). This is a fair concession. Section 17.461 of the DTPA makes it a state jail felony offense if a

person "contrives, prepares, establishes, operates, advertises, sells, or promotes a pyramid promotional scheme." TEX. BUS. & COM. CODE § 17.461(c). Section 17.50(a)(1)(A) in turn provides that a consumer may maintain an action when a person engages in a false, misleading, or deceptive act or practice that is listed in § 17.46(b). Section 17.46's "laundry list" of "false, misleading, or deceptive acts or practices" includes "promoting a pyramid promotional scheme, as defined by Section 17.461." TEX. BUS. & COM. CODE § 17.46 (b)(21). The DTPA defines a "pyramid promotional scheme" as a "plan or operation by which a person gives consideration for the opportunity to receive compensation that is derived primarily from a person's introduction of other persons to participate in the plan or operation rather than from the sale of a product by a person introduced into the plan or operation." TEX. BUS. & COM. CODE § 17.461(a)(6).

Plaintiffs have conclusively admitted, among other things, that:

- WIN is not a "promotional pyramid scheme", a "classic pyramid scheme", or any kind of "pyramid scheme" (Defs. App. 19, 59, 92).

- WIN complies with all state and federal laws governing multilevel marketing companies. (*Id.* at 19, 59, 92).

- The WIN Defendants do not give any consideration for the opportunity to receive compensation that is derived

primarily from a person's introduction of other persons to participate in WIN rather than from the sale of a product by a person introduced to WIN. (*Id.* at 20-21, 60-61, 93-94).

- WIN's commissions, bonuses, and overrides are based solely on the sales of product. (*Id.* at 20, 60, 93).

- WIN pays nothing to an independent distributor for the recruitment of a distributor. (*Id.* at 20, 60, 93).

- Plaintiffs made retail sales of WIN product inventory. (*Id.* at 15-16, 56-57, 89-90).

- Plaintiffs have sustained no damages in this action. (*Id.* at 32, 71, 104).

Based on these admissions, Plaintiffs are simply unable to establish that any of the WIN Defendants promoted a pyramid promotional scheme within the meaning of the DTPA. Accordingly, Defendants are entitled to summary judgment on Plaintiffs' cause of action under the DTPA.

To establish a RICO claim under 18 U.S.C. § 1962(a)-(c), a plaintiff must show that (1) a person engages in (2) a pattern of racketeering activity that is (3) connected to the acquisition, establishment, conduct, or control of an enterprise. *St. Paul Mercury Ins. Co. v. Williamson*, 224 F.3d 425, 439 (5 Cir. 2000). A "person" under RICO is the defendant that

committed the RICO violation and can be "any individual or entity capable of holding a legal or beneficial interest in property." 18 U.S.C. § 1961(3); *St. Paul*, 224 F.3d at 440. "Racketeering activity" includes certain state and federal offenses listed in § 1961(1). *Kwan-Tai Corp. v. Mastercraft Printers, Inc.*, 2001 WL 487329, at *4 (E.D. La. May 7, 2001). The individual acts of racketeering are commonly described as the "predicate" acts or offenses. *Id.* An "enterprise" is broadly defined by the act, and it "can be either a legal entity or an association-in-fact." 18 U.S.C. § 1961(4); *St. Paul*, 224 F.3d at 440. There is no RICO liability if the plaintiff did not suffer damages as a result of the predicate acts. *See* 18 U.S.C. § 1964(c); *McCaleb v. A.O. Smith Corp.*, 200 F.3d 747, 752 (11 Cir. 2000); *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1320 (2 Cir. 1990).

Plaintiffs admit, among other things, that:

- Defendants did not commit a single RICO predicate act. (Defs. App. 30-31, 70, 102-03).

- WIN is not an enterprise within the meaning of 18 U.S.C. § 1961(4). (*Id.* at 32, 71, 104).

- Defendants are not part of an association-in-fact enterprise within the meaning of 18 U.S.C. § 1961(4). (*Id.* at 32-33, 71-72, 104-05).

- No defendant engaged in mail or wire fraud in violation of 18 U.S.C. § 1341 or § 1343. (*Id.* at 33, 72, 105).

- None of the Defendants have conspired to violate 18 U.S.C. § 1962. (*Id.* at 33, 73, 105).

- No defendant made any misrepresentation of material fact to Plaintiffs. (*Id.* at 34, 73, 106).

- Plaintiffs have sustained no damages in this action. (*Id.* at 32, 71, 104).

These admissions conclusively negate one or more elements of Plaintiffs' cause of action under RICO. Defendants are accordingly entitled to summary judgment on Plaintiffs' RICO claim.

C. No Evidence

Defendants also move for summary judgment on no-evidence grounds. As stated by the Fifth Circuit:

> On summary judgment, the moving party is not required to negate the nonmoving party's claims or present evidence proving the absence of a material fact issue; rather, the moving party may meet its burden by simply "pointing to an absence of evidence to support the nonmoving party's case." Once the moving party files a properly supported motion for summary judgment, the burden then shifts to the non-moving party to "set forth specific

> facts showing that there is a genuine issue for trial." *Summary judgment will be granted* where the nonmovant is unable to point to any evidence in the record that would sustain a finding in the nonmovant's favor on any issue on which he bears the burden of proof at trial.

Le v. Cheesecake Factory Rests. Inc., 2007 WL 715260, at *4 (5 Cir. March 6, 2007) (citations omitted) (emphasis added). Here, in the face of Defendants' no-evidence challenge, Plaintiffs have failed to point to any evidence that would support a finding in their favor at trial. Plaintiffs have thus failed to meet their burden of showing that there are genuine issues for trial. Defendants are entitled to summary judgment on Plaintiffs' claims.

III. Conclusion

For the reasons set forth above, the Court GRANTS Defendants' motion for summary judgment in its entirety. The Court will separately issue a judgment.

SO ORDERED.

SIGNED July 16th, 2007

_____

JANE J. BOYLE
UNITED STATES DISTRICT JUDGE